IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ASAD EL-AMIN MUJIHADEEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 03-2044-D/A
	)	
TENNESSEE BOARD OF PROBATION AND PAROLES, et al.,	)	
	)	
Defendants.	)	

ORDER OF DISMISSAL
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
NOTICE OF APPELLATE FILING FEE

Plaintiff Asad El-Amin Mujihadeen, who is also known as Ronald Turks, Tennessee Department of Corrections prisoner number 86217, an inmate at the West Tennessee State Penitentiary ("WTSP") in Henning, Tennessee, filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Tennessee on November 4, 2002 in which he complained about a decision by the Tennessee Board of Probation and Paroles denying him parole in connection with his 1979 conviction for felony murder. Plaintiff paid the civil filing fee. On December 4, 2002, the Honorable Aleta A. Trauger issued an order transferring the case to the Eastern Division of this district. Judge Trauger

reasoned that, although, pursuant to 28 U.S.C. § 1391(b), "venue in this action is technically proper in this judicial district based on where the defendants reside . . . [,] for the convenience of parties and witnesses, and in the interest of justice, venue in this matter is more appropriate in the Western District of Tennessee." Judge Trauger also relied on the fact that the parole hearings that gave rise to the plaintiff's cause of action took place at the WTSP. The action was docketed in the Eastern Division on January 10, 2003. On January 17, 2003, the Honorable James D. Todd issued an order transferring the case to this division because the WTSP is in Lauderdale County, which is in the Western Division. 28 U.S.C. § 123(c)(2). The case was docketed in this division on January 21, 2003. The Clerk shall record the defendants as the Tennessee Board of Probation and Paroles (the "Board") and its members, Charles Traughber, Bill Dalton, Ray Maples, Sheila Swaringen, William T. Anderson, and Larry Hassell.

As a preliminary matter, on January 22, 2003 plaintiff filed a motion to amend his complaint. As a plaintiff is entitled to amend his complaint once without leave of Court before a responsive pleading is filed, Fed. R. Civ. P. 15(a), plaintiff's motion is GRANTED.

I. Analysis of Plaintiff's Claims

Plaintiff was convicted of felony murder in 1979 and sentenced to life imprisonment. His conviction and sentence were

affirmed on direct appeal, in an unpublished opinion, and his various state and federal petitions for collateral relief were dismissed. In this complaint, plaintiff complains about a decision by the Board denying him parole.

Plaintiff's first parole hearing allegedly occurred on June 20, 2001 before defendant Hassell, who acted as hearing officer. Compl., ¶ 5. Notwithstanding what plaintiff contends are numerous favorable recommendations, id., Hassell voted to deny parole on the ground that the release from custody at this time would depreciate the seriousness of the crime of which the offender stands convicted or promote disrespect of the law. Plaintiff complains that defendants Maple and Anderson adopted defendant Hassell's recommendation without conducting a review of his files. Id., ¶ 7.

Plaintiff next came up for parole on June 18, 2002, at which time he appeared before defendants Hassell and Maples, who acted as hearing officers. Id., ¶¶ 4, 6. Defendant Maples voted to deny parole and to schedule plaintiff's next parole hearing for 2010 based on the seriousness of the offense. Id., ¶ 6. Defendant Hassell apparently voted to deny parole on the same basis but recommended that plaintiff's next parole hearing be scheduled for June of 2003. Three additional members of the Board eventually voted to deny plaintiff parole, although they concurred in the recommendation that plaintiff's next parole hearing take place in

2003. Plaintiff apparently requested an appellate review by the Board, pursuant to Tenn. Code Ann. § 40-28-105(d)(11) (Supp. 1999), which was denied on September 10, 2002.

Plaintiff objects to the fact that the Board has summarily denied him parole on the basis of the seriousness of the offense, whereas he was aware of instances in which the Board had granted parole to certain so-called "Death-Row Lifers,"[1] "despite many of them having had prior felony convictions, had committed additional felonies after death sentences had been commuted, many of whom had served less time than Plaintiff and other 'Non-Death Row Lifers' (similarly situated), without 'seriousness of the offense' proffered or hindering their parole grant." Id., ¶ 7. The individual defendants are alleged to have engaged in "intentional and purposeful discriminatory release of 'Death-Row Lifers' [some of their first appearance], while using a 'boiler plate reason' to deny parole to Plaintiff, and others similarly situated, whom [sic] are 'Non-Death Row Lifers.'" Id., ¶ 3A (emphasis omitted).

[1] Plaintiff uses the term "Death-Row Lifers" to refer to former death row prisoners whose death sentences were commuted to life or 99 years due to constitutional infirmities in the death penalty statutes, not the findings of the juries which convicted them. This definition would presumably exclude former death row inmates whose death sentences were overturned in connection with state postconviction petitions or petitions pursuant to 28 U.S.C. § 2254, and who were not subsequently resentenced to death, either because the State elected to forego a new penalty hearing or because the penalty-phase jury did not impose a death sentence. By contrast, plaintiff uses the term "Non-Death-Row Lifers" to refer to prisoners serving sentences of life or 99 years by virtue of jury verdicts or guilty pleas, but whose judgments included eventual eligibility for parole.

The original complaint gave no indication of how prevalent this alleged phenomenon is, nor did it provide any specific examples of former death row inmates who were granted parole at their first hearing.[2] Plaintiff remedied this deficiency to some extent with his January 22, 2003 amendment, which includes a case summary that purports to list three individuals who allegedly had their death sentences commuted and were subsequently released on parole.[3] The remainder of plaintiff's case summary, however, undercuts plaintiff's theory of systematic discrimination against "Non-Death-Row" Lifers, since it recounts examples of other individuals who were sentenced to life imprisonment or ninety-nine years who were released on parole.

Plaintiff seeks "the appropriate Declaratory and Injunctive Relief."

This Court is required to screen complaints submitted by prisoners and to dismiss any complaint, or portion thereof, if the action--

> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

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[2] Thus, while the exhibits to the original complaint contain a certificate of commutation for an inmate named Guy R. Smith, the complaint does not indicate that Smith was ever released on parole. Indeed, according to records maintained by the Tennessee Department of Corrections ("TDOC"), Smith is currently incarcerated and his next parole hearing is not until 2005. (These records do not exclude that possibility that Smith was released on parole and subsequently had his parole revoked.)

[3] TDOC's website confirms that one of the three listed inmates, Frank Aylor, is currently on parole. The second, Foster Davis, is currently incarcerated. Because plaintiff did not provide a prisoner number for David Lee Smith, the Court is unable to confirm whether he is, in fact, on parole.

(2) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915A(b). Plaintiff's complaint is subject to dismissal in its entirety.

First, this plaintiff does not seek money damages but, rather, speedier release from prison. That remedy is not available through a civil action pursuant to 42 U.S.C. § 1983; instead, the plaintiff's remedy is solely through a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. See Preiser v. Rodriguez, 411 U.S. 474, 500 (1973). The Court declines to construe this action as a federal habeas petition because, inter alia, this plaintiff has already filed one federal habeas petition that was resolved on the merits, and he has not sought leave from the Sixth Circuit to file a second or successive petition, as required by 28 U.S.C. § 2244(b)(3).[4] Moreover, it does not appear that plaintiff has completely exhausted this claim in state court, as required by 28 U.S.C. § 2254(b)(1).[5]

Second, to the extent plaintiff complains about due process deprivations in the parole process, he has no claim.

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[4] The Court also declines to transfer to the Sixth Circuit any filing that is not expressly termed a habeas petition.

[5] Inmates who are dissatisfied with decisions of the Board "may obtain judicial review using a petition for common law writ of certiorari. This petition limits the scope of review to a determination of whether the Board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily." Pipher v. Tennessee Board of Parole, No. M2000-01509-COA-R3-CV, 2002 WL 31443204, at *3 (Tenn. Ct. App. Nov. 1, 2002). Plaintiff's Equal Protection claim is, in essence, a claim that the Board arbitrarily discriminates in favor of "Death-Row-Lifers," which would seem to be encompassed by this procedure.

Prisoners have no constitutional right to be released on parole before the expiration of their sentences. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979). Moreover, Tennessee's statutory scheme places the decision to grant parole within the complete discretion of the Board.[6] Under these circumstances, inmates have no state-created liberty interest in parole. See Wright v. Trammell, 810 F.2d 589 (6th Cir. 1987) (per curiam) (Tennessee law creates no liberty interest in parole).[7] Without any liberty interest, plaintiff cannot invoke the procedural protections of the Due Process Clause. Olim v. Wakinekona, 461 U.S. 238, 250-51 (1983).

The complaint also does not state a valid Equal Protection claim. "To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 335 (6th Cir. 1990) (quoting Johnson v. Morel,

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[6] Even if plaintiff were entitled to application of the statutes in effect at the time of his conviction, Tenn. Code Ann. §§ 40-28-301 and 302 (repealed 1985), see Phifer, 2002 WL 31443204, at *3-*4, § 302(b) explicitly provided that "[r]elease classification is a privilege and not a right." Moreover, the statute specifically provides that the Board may deny parole on the basis of the criteria relied on by the Board in plaintiff's case. Tenn. Code Ann. § 40-28-302(b)(2) & (4) (repealed 1985). The current version of the criteria governing release eligibility, set forth in Tenn. Code Ann. § 40-35-503(b)(2) & (4) (1997), is virtually identical.

[7] Tennessee courts have consistently interpreted Tennessee law as not creating a liberty interest in parole decisions. See, e.g., Pipher, 2002 WL 31443204, at *3; Kaylor v. Bradley, 912 S.W.2d 728, 733 (Tenn. Ct. App. 1995); Wells v. Tennessee Bd. of Paroles, 909 S.W.2d 826 (1995).

876 F.2d 477, 479 (5th Cir. 1989) (en banc)).[8] If the plaintiff is a member of a class that is not "protected," the plaintiff's class "merits constitutional protection only insofar as the state actor could have had no conceivable rational basis for distinguishing it." Purisch v. Tennessee Technological Univ., 76 F.3d 1414, 1424 (6th Cir. 1996).

In this case, the plaintiff argues that the Board intentionally favors "Death-Row Lifers" over "Non-Death-Row Lifers" in its parole decisions. That allegation does not state a valid claim because prisoners are not a protected class for equal protection purposes. Berry v. Traughber, 48 Fed. Appx. 483, 485 (6th Cir. Aug. 14, 2002); Garrison v. Walters, No. 00-1662, 2001 WL 1006271, at *2 (6th Cir. Aug. 24, 2001); Heddleston v. Mack, No. 00-1310, 2000 WL 1800576, at *2 (6th Cir. Nov. 30, 2000) ("prisoners incarcerated at the same institution as Heddleston who wished to mail items weighing more than one pound on January 9, 1999, do not constitute a protected class"); Aldred v. Marshcke, No. 98-2169, 1999 WL 1336105, at *1 (6th Cir. Dec. 20, 1999); Shehee v. Luttrell, 199 F.3d 295, 301 (6th Cir. 1999); Preston v. Hughes, No. 97-6507, 1999 WL 107970, at *1 (6th Cir. Feb. 10, 1999); Cook v. Cook, No. 96-3419, 1997 WL 121207, at *1 (6th Cir. Mar. 14, 1997). Moreover, although plaintiff's claim is arguably

[8] Alternatively, the plaintiff may allege that the challenged action unduly burdens the exercise of a fundamental right. However, as previously noted, prisoners have no fundamental right to release on parole. Accordingly, the plaintiff must demonstrate his membership in a protected class.

subject to rational basis scrutiny, in this case the Court is not persuaded of the existence of the class-based discrimination alleged by the plaintiff.

The plaintiff has failed to identify any rule or policy that, on its face, favors "Death-Row Lifers." Moreover, the intentional discrimination alleged by the plaintiff is entirely implausible on its face,[9] and the plaintiff has failed to present any conceivable rationale for Board members to engage in it. Instead, the only evidence this plaintiff has presented that this so-called phenomenon even exists rests entirely on the decision of the Board with respect to his own application for parole. Although the plaintiff has identified several so-called "Death-Row Lifers" whose crimes were just as serious as his who were released on parole, that does not evidence class-based discrimination. Indeed, plaintiff's class-based allegations are contradicted by the case summary he filed on January 22, 2003, which included several examples of "Non-Death-Row Lifers" who were released on parole, and no examples of "Non-Death-Row Lifers" whose parole was denied. At bottom, then, plaintiff's claim is not class-based at all: he is upset that he was denied parole solely on the basis of the seriousness of his offense when the murderers listed in the case

[9] In that regard, it is noteworthy that the class of "Death-Row Lifers," as defined by plaintiff, include only inmates whose sentences were commuted because of constitutional problems with the death penalty statute. Any inmate whose sentence was reduced because of errors in his sentencing hearing, or because questions have arisen about his actual innocence, is, by definition, excluded from this class.

summary, "Death-Row Lifers" and "Non-Death-Row Lifers" alike, were released on parole. Because the plaintiff has no evidence of class-based discrimination, he has no equal protection claim.

For all the foregoing reasons, the Court DISMISSES plaintiff's complaint, in its entirety, pursuant to 28 U.S.C. § 1915A(b)(1).

II. Appeal Issues

The next issue to be addressed is whether plaintiff should be allowed to appeal this decision in forma pauperis. Twenty-eight U.S.C. § 1915(a)(3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). An appeal is not taken in good faith if the issue presented is frivolous. Id. Accordingly, it would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the defendants, yet has sufficient merit to support an appeal in forma pauperis. See Williams v. Kullman, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). The same considerations that lead the Court to dismiss this case for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith.

It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by plaintiff is not

taken in good faith and plaintiff may not proceed on appeal in forma pauperis.

The final matter to be addressed is the assessment of a filing fee if plaintiff appeals the dismissal of this case.[10] In McGore v. Wrigglesworth, 114 F.3d 601, 610-11 (6th Cir. 1997), the Sixth Circuit set out specific procedures for implementing the PLRA. Therefore, the plaintiff is instructed that if he wishes to take advantage of the installment procedures for paying the appellate filing fee, he must comply with the procedures set out in McGore and § 1915(b).

For analysis under 28 U.S.C. § 1915(g) of future filings, if any, by this plaintiff, this is the first dismissal in this district of one of his cases as frivolous or for failure to state a claim.

IT IS SO ORDERED this _____ day of February, 2003.

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BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

[10] The fee for docketing an appeal is $100. See Judicial Conference Schedule of Fees, ¶ 1, Note following 28 U.S.C. § 1913. Under 28 U.S.C. § 1917, a district court also charges a $5 fee:

> Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.